Filed 3/25/19 P. v. Maynez CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID MAYNEZ, Defendant and Appellant.	B281590 Los Angeles County Super. Ct. No. ZM015154

APPEAL from an order of the Superior Court of Los Angeles County, Terrance T. Lewis, Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Under the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6601 et seq.),[1] the state may petition to involuntarily commit a person to a state mental health facility upon his release from custody or upon completion of parole. To do so, the state must show beyond a reasonable doubt that the person is a "sexually violent predator" (SVP), i.e., he has been convicted of at least one sexually violent crime, he currently suffers from a mental disorder, and the disorder makes it likely he will commit further violent sex offenses if he is released. (§ 6600, subd. (a)(1).)

David Maynez was involuntarily committed to a state mental hospital for an indeterminate term after a jury found him to be an SVP. The SVP trial focused mainly on whether Maynez currently has a mental disorder within the meaning of the SVPA. Two SVP evaluators testified he does and each relied, in part, on the results of a penile plethysmograph (PPG) test which indicated Maynez was aroused by several categories of deviant sexual stimuli and one category of non-deviant sexual stimuli. Defense counsel successfully moved to exclude the written report summarizing the PPG test results but did not object to testimony by the technician who administered the PPG test or the SVP evaluators' testimony relying on the PPG test results. The defense expert, who concluded Maynez does not have a mental disorder, testified the PPG test was not a reliable diagnostic tool and, in any event, the test showed Maynez was most aroused by non-deviant stimuli and the moderate arousal to deviant stimuli

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[1] All undesignated statutory references are to the Welfare and Institutions Code.

was to be expected given his criminal history—but was not indicative of a current mental disorder.

On appeal, Maynez concedes he forfeited any challenge to the admission of the PPG-related evidence but contends his attorney rendered ineffective assistance of counsel by failing to object to the testimony on *Kelly/Frye* grounds.[2] Generally, a party alleging ineffective assistance of counsel must demonstrate counsel's performance was deficient and the claimed deficiency was prejudicial. To succeed on this claim in a direct appeal where, as here, the record does not reflect the reason for counsel's actions, a party must establish no reasonable explanation for counsel's conduct could exist—an extremely difficult task in most cases. We conclude counsel's choice to use the PPG test results rather than move to exclude them and all related testimony was reasonable and counsel therefore rendered effective assistance. Accordingly, we affirm.

THE SEXUALLY VIOLENT PREDATOR ACT

1. The Statutory Scheme

"The SVPA took effect on January 1, 1996. (Stats. 1995, ch. 763, § 3.) It provides for the involuntary civil commitment of certain offenders, following the completion of their prison terms, who are found to be SVP's because they have previously been

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[2] In *People v. Kelly* (1976) 17 Cal.3d 24, 30 (*Kelly*), the California Supreme Court reaffirmed that California courts follow *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014, which requires a party proffering expert opinion testimony based on a new scientific technique to establish the technique's reliability and acceptance within the relevant scientific community before the expert testimony will be allowed.

convicted of sexually violent crimes and currently suffer diagnosed mental disorders which make them dangerous in that they are likely to engage in sexually violent criminal behavior. (§ 6600 et seq.)" (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 902 (*Ghilotti*).) "The SVPA is designed ' "to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior" ' and to keep them confined until they no longer pose a threat to the public. [Citation.] Thus, '[t]he SVPA is not punitive in purpose or effect,' and proceedings under it are ' "special proceedings of a civil nature." ' [Citation.]" (*People v. Putney* (2016) 1 Cal.App.5th 1058, 1065, original brackets.)

An SVP is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) "A 'diagnosed mental disorder' is defined in its entirety as 'includ[ing] a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.' (*Id.*, subd. (c).) The phrase, 'danger to the health and safety of others,' is accompanied by language making clear that proof of a 'recent overt act' or crime 'in custody' is not required. (*Id.*, subds. (d) & (f).)" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1144 (*Hubbart*).)

A person " 'has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody,' " within the meaning of the

SVPA "if, because of the person's diagnosed mental disorder, he or she currently presents a *substantial* danger—that is, a *serious and well-founded risk*—of criminal sexual violence unless maintained in an appropriate custodial setting which offers mandatory treatment for the disorder. On the other hand, [the SVPA] does *not* require an evaluator to determine there is a *better than even* chance of new criminal sexual violence if the person is free of custody and mandatory treatment." (*Ghilotti*, *supra*, 27 Cal.4th at pp. 894–895.)

"[T]he 'mental disorder' prong of the SVPA ... is distinct from the prong addressing the *degree of future dangerousness* ... . Entirely aside from future dangerousness, the SVPA requires a diagnosed mental disorder *affecting the person's emotional or volitional capacity* that predisposes the person to commit sex crimes in a menacing degree. (§ 6600, subd. (c).) ... [T]his requirement alone implies 'serious difficulty' in controlling behavior ... ." (*People v. Williams* (2003) 31 Cal.4th 757, 776–777.)

An SVP must also have "been convicted of a sexually violent offense against one or more victims ... ." (§ 6600, subd. (a)(1).) "However, prior crimes play a limited role in the SVP determination. 'Conviction of one or more [sexually violent offenses] shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. ... Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a *currently* diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.'

[Citation.]" (*Hubbart*, *supra*, 19 Cal.4th at p. 1145, first set of brackets in original, italics added.)

2. The SVP Evaluation Process

"The process for determining whether a convicted sex offender meets the foregoing requirements takes place in several stages, both administrative and judicial. Generally, the Department of Corrections screens inmates in its custody who are 'serving a determinate prison sentence or whose parole has been revoked' at least six months before their scheduled date of release from prison. (§ 6601, subd. (a).) [Fn. omitted.] This process involves review of the inmate's background and criminal record, and employs a 'structured screening instrument' developed in conjunction with the Department of Mental Health.[3] (*Id.*, subd. (b).) If officials find the inmate is likely to be an SVP, he is referred to the Department of Mental Health for a 'full evaluation' as to whether he meets the criteria in section 6600. (§ 6601, subd. (b).)

"The evaluation performed by the Department of Mental Health must be conducted by at least two practicing psychiatrists or psychologists in accordance with a standardized assessment protocol. (§ 6601, subds. (c) & (d).) 'The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type,

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[3] In 2014 the statutes were amended to reflect that the relevant agency is now the State Department of State Hospitals. (Stats. 2014, ch. 442, § 16.)

degree, and duration of sexual deviance, and severity of mental disorder.' (*Id.*, subd. (c).)

"Two evaluators must agree that the inmate is mentally disordered and dangerous within the meaning of section 6600 in order for proceedings to go forward under the Act. (§ 6601, subd. (d).) In such cases, the Department of Mental Health transmits a request for a petition for commitment to the county in which the alleged SVP was last convicted, providing copies of the psychiatric evaluations and any other supporting documentation. (*Id.*, subds. (d), (h) & (i).) [Fn. omitted.] 'If the county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court ... .' (*Id.*, subd. (i).)" (*Hubbart*, *supra*, 19 Cal.4th at pp. 1145–1146.)

"The SVPA also provides for evaluations to be updated or replaced after a commitment petition has been filed. (§ 6603, subd. (c).) Section 6603, subdivision (c) was enacted to clarify the right of the attorney seeking commitment to obtain up-to-date evaluations, in light of the fact that commitment under the SVPA is based on a 'current mental disorder.' [Citations.]" (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 647.)

"The filing of the petition triggers a new round of proceedings under the [SVPA]. The superior court first holds a hearing to determine whether there is 'probable cause' to believe that the person named in the petition is likely to engage in sexually violent predatory criminal behavior upon release. (§ 6602, as amended by Stats. 1996, ch. 4, § 4, and by Stats. 1998, ch. 19, § 3.) [Fn. omitted.] The alleged predator is entitled to the assistance of counsel at this hearing. If no probable cause is found, the petition is dismissed. However, if the court finds probable cause within the meaning of this section, the court

orders a trial to determine whether the person is an SVP under section 6600. The alleged predator must remain in a 'secure facility' between the time probable cause is found and the time trial is complete. (§ 6602.) [Fn. omitted.]

"At trial, the alleged predator is entitled to 'the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports.' (§ 6603, subd. (a).) Either party may demand and receive trial by jury. (*Id.*, subds. (a) & (b); see *id.*, subd. (c).) [¶] The trier of fact is charged with determining whether the requirements for classification as an SVP have been established 'beyond a reasonable doubt.' (§ 6604.) ... [W]here the requisite SVP findings are made, 'the person shall be committed ... to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility ... .' ([§ 6604].)" (*Hubbart*, *supra*, 19 Cal.4th at pp. 1146–1147.)

FACTS AND PROCEDURAL BACKGROUND

1. The SVP Predicate Offenses

Maynez raped two 13-year-old girls in 1978.[4]

In the first case, the victim was walking home from church early in the morning, at approximately 7:45 a.m. Maynez followed her and as they neared an alley, he grabbed the girl by the neck and choked her as he pulled her into the alley. He asked the girl's name and when she didn't respond, he choked her harder until she told him. He also told her to keep her eyes closed

[4] Rape (Pen. Code, § 288) is a qualified predicate offense under the SVPA. (§ 6600, subd. (b).)

and threatened to slap her repeatedly if she didn't comply. He forced the victim to pull down her pants and then raped her, choking her all the while. The entire event took approximately 20 minutes.

The second rape occurred about one week after the first. This victim was at a park near a school. Maynez snuck up behind her while she was at a drinking fountain and grabbed her by the neck. While he choked the girl, he dragged her up some stairs and to a concealed area behind some buildings. As with the first victim, he forced the girl to pull down her pants and then he penetrated her while she faced him. He then required her to turn around and he penetrated her again, choking her through the entire sequence. At one point, when the victim started to scream, Maynez threatened to kill her if she did not stop.

Maynez pleaded guilty to both charges and was committed to a state hospital as a Mentally Disordered Sex Offender for an indeterminate period not to exceed five years and four months.[5] Maynez was released from the state hospital in 1985.

2. The 2003 Assault

Maynez committed another crime in 2003 which evidenced some of the same sexually violent conduct as the 1978 rapes. The victim of the 2003 incident testified at the SVP trial and described the assault.

While she was walking in her neighborhood, she saw Maynez, who was a casual acquaintance, also walking on the street. Maynez ran up behind her, struck up a conversation, and

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[5] Before the enactment of the SVPA, former section 6300 et seq. governed the commitment of mentally disordered sex offenders.

asked if she wanted to go eat with him. After she agreed, he said he needed to stop by his house, which was only a block away, to get some money. When they reached the house, Maynez invited her inside.

Once inside, Maynez offered her some water and while she drank it he moved to another part of the house. Maynez returned suddenly and, from behind her, placed a ligature[6] around her neck and began to choke her. As he squeezed tighter and tighter, she began to lose consciousness and eventually dropped to the floor. When she regained consciousness, she attempted to escape through the front door but then realized Maynez had locked the door from the inside with a key, which was no longer in the lock. Maynez pulled her away from the door, grabbing her wrist, and began pulling at her clothes. After some pleading, Maynez agreed to unlock the door if she would orally copulate him and have sexual intercourse with him, which she did. She escaped through the front door later, after Maynez left the room.

In 2004, Maynez pleaded guilty to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[7] and was sentenced to six years in state prison, which he served.

3. The SVP Evaluation

Before Maynez's release, the District Attorney for the County of Los Angeles received a referral by the (then) Department of Mental Health and filed a petition seeking a

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[6] She described the device as a towel wrapped with tape which had wire handles on each end.

[7] Assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) is not a qualified predicate offense within the meaning of the SVPA. (§ 6600, subd. (b).)

probable cause SVP determination under section 6601.5 and a petition seeking to commit Maynez as an SVP. The court found probable cause and Maynez resided at Coalinga State Hospital following the completion of his prison term for the 2003 assault. While there, he participated in a wide variety of groups providing treatment, teaching skills, supporting alcohol and narcotic abuse recovery, and offering other modalities. Maynez also participated in PPG testing. Multiple psychologists interviewed Maynez as part of the SVP evaluation process, including two evaluators hired by the State Department of State Hospitals, Dr. Dana Putnam and Dr. Michael Musacco.

4. The SVP Trial

The 1978 rapes qualify as predicate offenses under the SVPA. (Pen. Code, § 288; § 6600, subd. (b).) Accordingly, the trial focused on the other required SVP findings, namely, whether Maynez was currently suffering from a mental disorder which made it likely he would commit a violent sex offense if released.

Trial proceedings began on January 20, 2017. As already noted, the victim of the 2003 assault testified at the SVP trial. The People also presented testimony by Abel Vera, the technician who administered the PPG test on Maynez, Dr. Dana Putnam, and Dr. Michael Musacco. Maynez testified on his own behalf and offered testimony by an expert psychologist, Dr. Christopher Fisher. A summary of the relevant experts' testimony, as well as the specific testimony pertinent to the ineffective assistance claim, is summarized below.

4.1. The People's Evidence

4.1.1. The PPG Test

Maynez participated in PPG testing in 2015, while at Coalinga State Hospital. Abel Vera, the technician who administered the PPG tests, explained the test is a treatment tool that assesses arousal through the use of a gauge placed on the base of the subject's penis. After the gauge is in position, the subject is presented a series of potentially stimulating images and/or audio recordings. The stimuli typically include people with a range of ages and varying genders, and could include consensual, persuasive, or coercive/violent sexual scenarios. The gauge measures the subject's physiological response to the stimuli and any response greater than 20 percent of a full erection is considered clinically significant. The subject is also asked to "self-report," or provide their own subjective reaction to the stimuli, ranging from complete disgust to complete sexual arousal. Generally, after administering a PPG test, Vera writes a report and recommendation, then meets with the subject to provide feedback and answer questions. According to Vera, the PPG test is used as a treatment tool to help subjects and their treating doctors assess what further treatment should be provided.

In Maynez's case, PPG testing was performed on three days in early 2015. On the first day, he responded to four of the 12 stimuli which, on that day, were mainly photographs accompanied by narration of both deviant and non-deviant scenarios: he had a high response to consensual adult female sex and also responded to rape of an adult female, rape of a teenage female, and persuasive activity with a child. On the second day, the stimuli were visual only with ages ranging from four years

old to adult. Maynez responded only to the adult female stimulus. On the third day, the stimuli were audio only and Maynez had very low responses to everything.

Vera witnessed Maynez using suppression techniques during the third day of testing. He also observed that some of Maynez's "self-report" responses were inconsistent with his physiological responses on the first day. Specifically, although Maynez responded physiologically to several coercive scenarios on the first day of testing, he rated them as completely sexually disgusting. Finally, although Maynez said the gauge slipped from the base of his penis to the mid-shaft on the first day of testing, he did not report the slippage until all the testing had been completed.

4.1.2. The SVP Evaluators

Both SVP evaluators hired by the State Department of State Hospitals found Maynez had a current mental disorder making it likely Maynez would commit violent sex offenses if released. Although the specific diagnoses were slightly different, both fall into the general DSM-V[8] category of paraphilia, which includes sexual disorders. (See Couzens & Bigelow, Sex Crimes: California Law and Procedure (The Rutter Group 2015) § 14.2, pp. 14-10 to 14-11.) Dr. Putnam assigned the diagnosis of sexual sadism, a disorder in which the person is aroused by nonconsensual sex acts combined with physical or psychological suffering or humiliation of the victim. Dr. Putnam placed particular emphasis on the fact that in the 1978 rapes as well as

[8] DSM refers to the Diagnostic and Statistical Manual of Mental Disorders.

the 2003 assault, Maynez not only frightened his victims but choked them and intensified the choking to gain their compliance—all while maintaining the drive to have sexual intercourse. Dr. Musacco assigned the diagnosis of "other specified paraphilic disorder (non-consent)," a category not specifically called out in the DSM-V but which is characterized by sexual arousal to force or non-consent. Dr. Musacco observed the two diagnoses were very close but stated he did not diagnose sexual sadism because Maynez did not admit he was aroused by suffering of the victim during his interviews.

Dr. Putnam and Dr. Musacco agreed on most points relevant to the diagnoses. They agreed paraphilia is generally a chronic, life-long condition that affects the subject's ability to exercise control over their deviant urges. And here, Maynez was hospitalized and treated for a sexual disorder for six years but 18 years after his release he engaged in similar sexually violent behavior. Maynez also admitted, during interviews with the doctors, that he had rape fantasies relatively recently. And both SVP evaluators found it significant that Maynez had a long-standing history of thinking and fantasizing about rape starting when he was in his early teens.

The evaluators also saw evidence in his recent behavior suggesting a disorder was still present. For example, the 2003 offense involved prior planning, i.e., making of the device used to choke his 2003 victim. Both Dr. Putnam and Dr. Musacco noted that during his time at Coalinga State Hospital, Maynez made several ropes (at least one with handles) from discarded clothing.

The SVP evaluators also assessed Maynez with the STATIC-99 R test, a standardized test used to measure a subject's risk of re-offense. Dr. Putnam described Maynez as

having a "well above average risk" while Dr. Musacco determined he had a "high risk" of committing future sexually violent offenses. In addition to these other factors, the evaluators also agreed the PPG test results confirmed Maynez currently has a sexually deviant interest.

4.2. Maynez's Evidence

Maynez testified in his own behalf. He attempted to provide some context for the 1978 rapes, explaining he was despondent over a breakup and was abusing alcohol at the time. He also described the 2003 assault in very different terms than his victim, stating she was a prostitute he had paid for services he didn't receive and he only started choking her after he thought she stole his wallet.

Psychologist Christopher Fisher testified as an expert for Maynez. In his opinion, Maynez does not currently have a mental disorder. Instead, Dr. Fisher believed the more traditional explanations about why men commit rapes (issues of anger and control, being hypersexual, other types of emotional issues) provided better explanations for Maynez's conduct.

Dr. Fisher also interpreted the PPG test results differently than the SVP evaluators. In his view, the most relevant information was Maynez's relative levels of arousal. Specifically, he testified:

"But in Mr. Maynez's case, his response, really the thing that we look most at is what's the highest level of arousal. What kind of stimuli was it that initiated the highest level of arousal. And when we look at his P.P.G., the highest level of arousal was to consensual sex with adult women. And there were some other types of stimuli that he had a much lower response to. But when there is such a big gap between the level of response to the

appropriate stimuli and then the level of response to the more questionable or more deviant stimuli, we go back to this idea of relative arousal. So that is why we look at the highest kind of arousal."

In addition, Dr. Fisher explained that many men might have a physiological response to deviant stimuli but it is not an indication of any sort of mental disorder. And in Maynez's case specifically, Dr. Fisher said, "really, his response profile is basically what we would have expected from someone like him with his history of crimes and is not indicative of any kind of sexual deviance."

5. The Jury's Finding and the Appeal

After less than two days of deliberation, the jury found the People's SVP petition true. On February 3, 2017, the court signed the order committing Maynez to the State Department of State Hospitals for an indeterminate term under section 6004. Maynez timely appeals.

DISCUSSION

Maynez concedes his attorney did not object to the admission of the PPG-related testimony on *Kelly/Frye* grounds but contends the testimony is inadmissible as a matter of law and therefore his attorney rendered ineffective assistance of counsel by failing to object to that testimony. We disagree.

1. Maynez has forfeited his challenge to the admissibility of the PPG-related testimony.

The rules of evidence are not self-executing. We may not reverse a judgment or verdict based on "the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to

or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion[.]" (Evid. Code, § 353, subd. (a).) This rule exists to give the trial court a concrete legal proposition to pass on, to allow the proponent of the evidence an opportunity to cure the defect, and to prevent abuse. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

Defendant concedes his trial counsel did not object to the PPG-related testimony of the PPG technician, Abel Vera, or the SVP evaluators, Dr. Putnam and Dr. Mucasso, and does not directly challenge the admission of the evidence. He contends, however, that counsel's failure to object to this testimony constitutes ineffective assistance of counsel.

2. Maynez's counsel did not provide ineffective assistance of counsel.

2.1. Legal Principles

Although an SVP commitment proceeding is a civil proceeding, the alleged predator is entitled, as a matter of due process, to the effective assistance of counsel. (*People v. Hill* (2013) 219 Cal.App.4th 646, 652.) Under either the federal or state constitution, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) To establish ineffective assistance, Maynez must satisfy two requirements. (*Id*. at pp. 690–692.)

First, he must show his attorney's conduct was unreasonable "under prevailing professional norms"—that is, it

fell "outside the wide range of professionally competent assistance." (*Strickland*, *supra*, 466 U.S. at pp. 688, 690.) This requires him to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Id.* at p. 687.) " 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny …' and must 'view and assess the reasonableness of counsel's acts or omissions … under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Next, Maynez must demonstrate the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel's failings, the result of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at p. 687 [defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"].) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

Claims of ineffectiveness must usually be "raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform" the inquiry. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) "There may be cases in which

trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte." (*Massaro v. United States* (2003) 538 U.S. 500, 508.) But those cases are rare.

Usually, if "the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation. [Citations.]" (*People v. Scott*, *supra*, 15 Cal.4th at p. 1212.) These arguments should instead be raised on collateral review. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

2.2. Counsel's use of the PPG evidence was reasonable.

Maynez contends the PPG-related evidence was inadmissible and "trial counsel obviously had no tactical reason to allow the PPG test results into evidence without objection."

Regarding admissibility of the PPG test results and the testimony relying on it, our courts have held that like expert testimony based on other methods of scientific testing, testimony based on PPG testing is not admissible unless the reliability and acceptance of the testing within the scientific community is established. (See *Kelly*, *supra*, 17 Cal.3d at p. 30 [setting forth test to determine reliability of scientific evidence forming the basis of expert opinion]; *People v. John W.* (1986) 185 Cal.App.3d 801, 805 [applying *Kelly* test to expert testimony regarding PPG test results], disapproved on another point by *People v. Stoll* (1989) 49 Cal.3d 1136, 1152.) No published decision in California

has found PPG testing to be reliable and admissible under the *Kelly/Frye* test and no adequate showing was made in this case.[9] Indeed, both SVP evaluators, Maynez's expert psychologist, as well as the technician who administered the test, acknowledged the PPG test is subject to manipulation by the subject and is of limited use for that reason.

But even if PPG testing cannot pass the *Kelly/Frye* test, it is not necessarily true that counsel's failure to object to the admission of PPG-related testimony constitutes ineffective assistance of counsel. Indeed, one reason claims of ineffective assistance are typically limited to collateral review is that a failure to object is not necessarily evidence of incompetence. "[C]ompetent counsel may often choose to forgo even a valid objection. '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on

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[9] PPG testing has been rejected in many jurisdictions and has been harshly criticized by scholars. (See, e.g., *United States v. Weber* (9th Cir. 2006) 451 F.3d 552, 564–567 [discussing flaws inherent in PPG testing and collecting cases rejecting the use of PPG evidence]; Note, Blumberg, *The Hard Truth About the Penile Plethysmograph: Gender Disparity and the Untenable Standard in the Fourth Circuit* (2018) 24 Wm. & Mary J. of Women & L. 593, 600–604 [discussing numerous issues with standardization and the potential for false results]; Note, Bernstein, *Supervised Release, Sex-Offender Treatment Programs, and Substantive Due Process* (2016) 85 Fordham L.Rev. 261, 272–279 [reviewing scientific studies concluding PPG testing and arguing the test has limited utility]; Matthews et al., *Debunking Penile Plethysmograph Evidence* (2001) 28 No. 2 The Reporter 11 [summarizing state and federal court decisions rejecting use of PPG evidence].)

appeal.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1197, first set of brackets added.) The decision not to object to the People's proffered testimony regarding Maynez's PPG test results—as well as the decision to present expert testimony interpreting those test results to Maynez's advantage—"comes within this broad range of trial tactics that we may not second-guess. [Citation.]" (*Ibid*.)

Our survey of published and nonpublished cases mentioning PPG testing indicates that PPG test results—like polygraph test results[10]—may favor either side. In other words, the test results could tend to incriminate or exonerate a defendant in any given criminal case. In the present case, the SVP evaluators interpreted the test results in a manner suggesting Maynez is still aroused by deviant sexual stimuli—one of several factors supporting their conclusions that he currently suffers from a mental disorder that makes it likely he would reoffend if released into the community.

Importantly, however, Maynez's expert psychologist, Dr. Fisher, did not share that view. In his opinion, the most important thing the testing showed was that Maynez was highly aroused by non-deviant stimuli:

"But in Mr. Maynez's case, his response, really the thing that we look most at is what's the highest level of arousal. What kind of stimuli was it that initiated the highest level of arousal. And when we look at his P.P.G., the highest level of arousal was to consensual sex with adult women. And there were some other types of stimuli that he had a much lower response to. But when

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[10] Polygraph results are inadmissible in California. (Evid. Code, § 351.1.)

there is such a big gap between the level of response to the appropriate stimuli and then the level of response to the more questionable or more deviant stimuli, we go back to this idea of relative arousal. So that is why we look at the highest kind of arousal."

Dr. Fisher also explained that Maynez's past criminal history accounted for his modest arousal to a few categories of deviant stimuli: "[R]eally, his response profile is basically what we would have expected from someone like him with his history of crimes and is not indicative of any kind of sexual deviance."

Maynez's counsel specifically touched on this point during her closing argument, as she highlighted evidence suggesting Maynez was not likely to reoffend: "Also, let's go back a little bit about the P.P.G. test. He did have a high response to consensual sex with an adult, as probably most men would. And judging from the video porn industry there are many who would have an elevated response to watching sadistic porn sex."

Counsel's decision to use the PPG test results rather than moving to exclude them was reasonable here. Accordingly, Maynez's counsel did not provide ineffective assistance of counsel.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

DHANIDINA, J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.